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9  
10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 SAN FRANCISCO DIVISION

13 DANIEL KEATING-TRAYNOR on  
behalf of himself and all others similarly  
situated;

14 Plaintiffs,

15 v.  
16 AC SQUARE INC.; COMCAST INC.;  
AFSHIN GHANEH; ANDREW  
BAHMANYAR; AND DOES 1-60  
17 INCLUSIVE;  
18

19 Defendants.

20 Case No. CV-08-3035-MHP

21 [CALIFORNIA ACTION NO. CIV 464144  
CONSOLIDATED BY ORDER OF  
COURT WITH CIV 473571]

22 DEFENDANTS AC SQUARE, INC.,  
AFSHIN GHANEH AND ANDREW  
BAHMANYAR'S NOTICE OF MOTION  
AND MOTION TO DISMISS PLAINTIFF'S  
FIRST, SECOND, THIRD, FOURTH, AND  
FIFTH CAUSES OF ACTION FROM  
COMPLAINT, CASE NUMBER CV-08-  
3035-MHP; MEMORANDUM OF POINTS  
AND AUTHORITIES

23 FRCP Rule 12(b)(6)

24 Date: September 8, 2008  
25 Time: 2:00 p.m.  
Courtroom: 15  
26 Judge: Honorable Marilyn H. Patel

27 Firmwide: 85996330.1 047098.1008

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## **NOTICE OF MOTION AND MOTION**

**TO ALL PARTIES BY AND THROUGH THEIR RESPECTIVE ATTORNEYS OF  
RECORD:**

Please take notice that on September 8, 2008 at 2:00 p.m., or as soon thereafter as the matter may be heard in Courtroom 15 of the District Court of the Northern District of California located at 450 Golden Gate Avenue, San Francisco, CA 94012, before The Honorable Marilyn H. Patel, Defendants AC Square, Inc., Afshin Ghaneh and Andrew Bahmanyar (hereafter collectively referred to as "Defendants") will move this court for an order dismissing Plaintiff, Daniel Keating-Traynor's (hereinafter referred to as "Plaintiff") first, second, third, fourth and fifth causes of action against Defendants from the Complaint, case number CV-08-3035-MHP. Defendants' motion to dismiss Plaintiff's first, second, third, fourth and fifth causes of action from the action number CV-08-3035-MHP is brought pursuant to Federal Rule of Civil Procedure, Rule 12(b)(6) and on the grounds that each of these causes of action fail to state facts sufficient to sustain these claims. Defendants' motion to dismiss Plaintiff's second, third, fourth and fifth causes of action is made on the additional ground that these causes of action are barred by the applicable statute of limitations.

This Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities set forth below, the Request for Judicial Notice, any oral argument that may be heard, and all pleadings and papers on file in this action.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

## I. INTRODUCTION

Defendants bring this motion to dismiss Plaintiff's first, second, third, fourth and fifth causes of action against Defendants only and not on behalf of any other co-defendant, including Comcast, Inc. To the extent this motion discusses Plaintiff's allegations regarding co-defendant Comcast, Inc. in his conspiracy causes of action, Plaintiff's first, third and fifth causes of action, such discussion is made solely for the purpose of showing Plaintiff's Complaint fails to state facts sufficient to support a conspiracy cause of action against Defendants and for no other purpose. Counsel for Defendants does not represent Comcast, Inc. and no argument in this motion should be inferred as being made by or on behalf of Comcast, Inc.

1 Plaintiff's Complaint, action number CV-08-3035-EDL (reassigned action number  
 2 CV-08-3035-MHP), contains five causes of action against Defendants, each of which fail to state  
 3 facts sufficient to sustain these claims against Defendants as a matter of law. Specifically, Plaintiff's  
 4 first cause of action for conspiracy to violate California Business and Professions Code section  
 5 17200, his third cause of action for conspiracy to violate the federal Fair Labor Standards Act, 20  
 6 U.S.C. § 201 et seq, (hereinafter referred to as the "FLSA") and his fifth cause of action for  
 7 conspiracy to violate California Labor Code section 558 each fail to state facts showing a justiciable  
 8 conspiracy. Plaintiff's second cause of action for violation of the FLSA fails to state facts showing  
 9 Defendants did not pay the applicable federal minimum wage and/or that Defendants did not pay  
 10 Plaintiff overtime compensation to which he was entitled. In addition, Plaintiff's second cause of  
 11 action for violation of the FLSA; his third cause of action for conspiracy to violate the FLSA; his  
 12 fourth cause of action for violation of California Labor Code section 203 (entitled "Failure to Pay  
 13 Monies Due at Termination of Employment"); and his fifth cause of action for conspiracy to violate  
 14 California Labor Code section 558 are all barred by the applicable statute of limitations. Regarding  
 15 the statute of limitations, Plaintiff admitted in documents he filed with the San Mateo County  
 16 Superior Court that he last worked for AC Square, Inc. on May 2, 2005. In fact, Plaintiff claimed  
 17 that AC Square, Inc. terminated his employment May 2, 2005 in these documents. Thus, any claim  
 18 Plaintiff may have had against Defendants for alleged violations of the FLSA and/or California  
 19 Labor Code sections 203 and 558 began to run as of May 2, 2005 and are now time barred.

## 20 II. STATEMENT OF FACTS

### 21 A. AC Square, Inc.

22 AC Square, Inc. was formed in February 2004 and is a cable installation contractor,  
 23 doing work primarily for Comcast, Inc. Defendant provides installation of cable television and  
 24 computer related services primarily to residential customers of Comcast at various locations in  
 25 northern California. AC Square, Inc. currently employees between ninety and one hundred and  
 26 thirty technicians.

### 27 B. Procedural History

28 Plaintiff's instant Complaint, action number CV-08-3035-EDL (reassigned action  
 Firmwide:85996330.1 047098.1008 2.

1 number CV-08-3035-MHP), is the third of four Complaints Plaintiff has filed against AC Square,  
 2 Inc. and the second complaint he has filed against Afshin Ghaneh and Andrew Bahmanyar for the  
 3 same alleged wrong.

4 **1. Plaintiff's First Complaint**

5 Plaintiff filed his first Complaint against Defendants in the San Mateo County  
 6 Superior Court on July 7, 2006, action number CIV 456118. (hereinafter referred to as the "Original  
 7 Complaint") (Request for Judicial Notice, Exh. A). The Original Complaint contained five causes of  
 8 action for: (1) nonpayment of wages in violation of California Labor Code section 201; (2) failure to  
 9 pay overtime wages in violation of California Labor Code sections 510 and 1198; (3) violation of  
 10 California Labor Code section 2802; (4) wrongful termination; and, (5) failure to provide personnel  
 11 file/failure to provide itemized wage statements in violation of California Labor Code sections 226,  
 12 432 and 1198.5. *Id.* As pertinent to this motion, the Original Complaint alleged AC Square, Inc.  
 13 failed to pay Plaintiff compensation for all hours that he worked. Plaintiff dismissed his first,  
 14 second, third and fifth causes of action for wage and hour violations without prejudice on June 25,  
 15 2007. (Request for Judicial Notice, Exh. B). Plaintiff's fourth cause of action for wrongful  
 16 termination was dismissed following a grant of summary adjudication in favor of AC Square, Inc.  
 17 (Request for Judicial Notice, Exh. C). Judgment was entered on the Original Complaint on June 28,  
 18 2007. (Request for Judicial Notice, Exh. D).

19 **2. Plaintiff's Second Complaint**

20 Plaintiff filed a second Complaint against AC Square, Inc. in the San Mateo County  
 21 Superior Court on June 29, 2007, action number 464144. (hereinafter referred to as the "Second  
 22 Complaint") (Request for Judicial Notice, Exh. E). Plaintiff's Second Complaint contains five  
 23 causes of action for: (1) violation of California Business and Professions Code section 17200; (2)  
 24 violation of California Labor Code section 2802; (3) failure to pay overtime wages pursuant to  
 25 California Labor Code section 510 and 1194; (4) failure to furnish itemized wage statements  
 26 pursuant to California Labor Code section 226; and, (5) failure to pay wages due. *Id.* This  
 27 Complaint, like the Original Complaint, alleges AC Square, Inc. failed to pay Plaintiff compensation  
 28 for all hours worked. The first through fourth causes of action are brought on behalf of Plaintiff and  
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 3.

1 all other similarly situated individuals. *Id.* The fifth cause of action was brought by Plaintiff on his  
 2 own behalf. *Id.*

3           **3. Plaintiff's Third Complaint**

4           On June 10, 2008 Plaintiff filed a new Complaint in the San Mateo County Superior  
 5 Court, action number 473571, removed action number CV-08-3035-EDL (reassigned action number  
 6 CV-08-3035-MHP) (hereinafter referred to as the "Third Complaint") (Request for Judicial Notice,  
 7 Exh. F). Plaintiff's Third Complaint is the subject of the instant motion to dismiss. It, like the  
 8 Second Complaint, is styled as a class action on behalf of Plaintiff and all other similarly situated  
 9 individuals. *Id.* The Third Complaint names as defendants AC Square, Inc. and adds as defendants,  
 10 Comcast, Inc., Afshin Ghaneh, and Andrew Bahmanyar. It contains five causes of action for: (1)  
 11 conspiracy to violate California Business and Professions Code section 17200; (2) violation of the  
 12 FLSA; (3) conspiracy to violate the FLSA; (4) failure to pay monies at termination of employment;  
 13 and, (5) conspiracy to violate California Labor Code section 558. *Id.* This Complaint, like the  
 14 Original Complaint and the Second Complaint alleges the same wrongful conduct. The significant  
 15 differences between the Third Complaint and the Original and Second Complaint is this Complaint  
 16 alleges different causes of action and names additional defendants. However, the underlying  
 17 allegations are identical.

18           On June 19, 2008 AC Square, Inc. moved to consolidate Plaintiff's Second and Third  
 19 Complaints. (Request for Judicial Notice, Exh. G). The San Mateo Superior Court granted AC  
 20 Square, Inc.'s consolidation request and ordered the Second and Third Complaints consolidated  
 21 under action number 464144. *Id.* (The Second and Third Complaints will hereinafter be collectively  
 22 referred to as the "Consolidated Action"). On June 20, 2008 AC Square, Inc. removed the  
 23 Consolidated Action to this Court. (to Request for Judicial Notice, Exh. H).

24           **4. Plaintiff's Fourth Complaint**

25           On June 11, 2008, Plaintiff filed another new Complaint in the Northern District of  
 26 California, action number CV-08-2907-MHP. (hereinafter referred to as the "Fourth Complaint").  
 27 The Fourth Complaint, like the Third Complaint names as defendants AC Square, Inc., Comcast,  
 28 Inc. Afshin Ghaneh, and Andrew Bahmanyar. (Request for Judicial Notice, Exh. I). The Fourth  
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1 Complaint contains two causes of action for: (1) violation of the FLSA; and, (2) conspiracy to  
 2 violate the FLSA. *Id.* The Fourth Complaint is essentially the same as the Third Complaint, but only  
 3 alleges causes of action for alleged violations of the FLSA.

4 On June 27, 2008 Plaintiff filed an administrative motion to have the Consolidated  
 5 Action and the Fourth Complaint related. (Request for Judicial Notice, Exh. J.).

6 **C. Statement of Allegations**

7 This Motion is directed to the first, second, third, fourth and fifth causes of action in  
 8 Plaintiff's Third Complaint. Plaintiff's Third Complaint alleges AC Square, Inc. employs cable  
 9 technicians who install, disconnect, and upgrade cable television and computer services to Comcast  
 10 consumers. (Request for Judicial Notice, Exh. F, ¶ 1, p. 1:21-24). Plaintiff further alleges he "was  
 11 formerly employed by AC Square, Inc. as a cable television and computer technician and installed,  
 12 upgraded, disconnected and provided similar services to consumers who use Comcast services and  
 13 equipment of Comcast." (Request for Judicial Notice, Exh. F, ¶ 8, p. 3:10-12) (emphasis added).

14 Regarding Afshin Ghaneh and Andrew Bahmanyar, the Third Complaint alleges that  
 15 Mr. Ghaneh "is responsible for the payroll and business practice of AC Square [Inc.]" and "also  
 16 owns AC Square [Inc.]." (Request for Judicial Notice, Exh. F, ¶ 5, p. 2 16-17). It also alleges that  
 17 Mr. Bahmanyar "is responsible for the payroll and business practice of AC Square [Inc.]." (Request  
 18 for Judicial Notice, Exh. F, ¶ 5, p. 2 17-19).

19 While Plaintiff admits he was "formerly employed by AC Square, Inc.", the Third  
 20 Complaint conveniently omits any allegations showing time period he worked for AC Square, Inc.  
 21 However, in Plaintiff's prior action, the Original Complaint, Plaintiff expressly admitted that he was  
 22 employed by AC Square, Inc. from "around January 30, 2005" to "about May 2, 2005." (Request  
 23 for Judicial Notice, Exh. A, ¶ 5, p. 2:9; ¶ 13, p. 3:11). In that same Complaint, Plaintiff admitted that  
 24 AC Square, Inc. terminated him on about May 2, 2005. (Request for Judicial Notice, Exh. A, ¶ 13, p.  
 25 3:11).

26 In addition, the Third Complaint also fails to allege any facts showing Plaintiff's  
 27 weekly or monthly salary - or hourly wage – while he was employed by AC Square, Inc. It also  
 28 specifically fails to allege any facts showing the hours he claims to have worked for AC Square, Inc.  
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1 and/or whether Plaintiff actually worked any hours for the purposes of overtime compensation.

2 Notwithstanding Plaintiff's failure to allege the time period he worked for AC  
 3 Square, Inc., his salary, or his hours worked, Plaintiff concludes that he is entitled to bring this action  
 4 on his own and on behalf of all other similarly situated individuals and concludes that AC Square,  
 5 Inc. failed to pay him and other employees "wages during all hours that they worked." (Request for  
 6 Judicial Notice, Exh. F, ¶ 9, p. 3:17-19). He also claims AC Square, Inc. failed to pay overtime  
 7 compensation when he and/or other employees worked in excess of eight hours a day, more than  
 8 forty hours in a week, worked a seventh day in a row and/or worked more than eight hours on the  
 9 seventh day. (Request for Judicial Notice, Exh. F. ¶ 9, p. 3:17-19). Plaintiff's bases his first cause  
 10 of action for conspiracy to violate California Business and Professions Code section 17200; his  
 11 second cause of action for violations of the FLSA; his third cause of action for conspiracy to violate  
 12 the FLSA; his fourth cause of action for failure to pay monies due at termination of employment;  
 13 and his fifth cause of action for conspiracy to violate California Labor Code section 558 against AC  
 14 Square, Inc. exclusively on the above referenced allegations and nothing else. (Request for Judicial  
 15 Notice, Exh. F).

### 16 III. STATUTORY AUTHORITY

17 Defendants bring this Motion pursuant to Federal Rule of Civil Procedure, Rule  
 18 12(b)(6).<sup>1</sup> A Rule 12(b)(6) motion tests the legal sufficiency of the claims stated in a civil complaint  
 19 and authorizes the court to dismiss an action on the basis of a dispositive issue of law. See *Qwest*  
 20 *Communications Corp. v. City of Berkeley*, 208 F.R.D. 288, 291 (N.D. Cal. 2002).

21 In entertaining a Rule 12(b)(6) motion, a court must determine whether the facts  
 22 alleged by the plaintiff, if assumed to be true, would entitle that plaintiff to a legal remedy.  
 23 Dismissal of an action under Rule 12(b)(6) is proper "where there is either a 'lack of a cognizable  
 24 legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" 9  
 25 *Schwarzer, et. al., California Practice Guide: Federal Civil Procedure Before Trial*, § 9:187 (TRG  
 26 2007.) In ruling on such motion, "[g]enerally a court may not consider material beyond the  
 27 complaint." *Intri-Plex Technologies, Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9<sup>th</sup> Cir. 2007).

28 <sup>1</sup> Unless otherwise stated, all cited rules refer to the Federal Rules of Civil Procedure.  
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1     “However, ‘[a] court may take judicial notice of ‘matters of public record’ without converting a  
 2     notion to dismiss into a motion for summary judgment,’ as long as the facts notices are not ‘subject  
 3     to reasonable dispute.’” *Id.*; See also *Mullis v. United States Bankruptcy Court for the District of*  
 4     *Nevada*, 828 F.2d 1385, 1388 (9<sup>th</sup> Cir. 1987). Judicial admissions of fact are considered matters of  
 5     which a court may take judicial notice and are binding on the parties and the court. *American Title*  
 6     *Ins. Co. v Lacelaw Corp.*, 861 F.2d 224, 226 (9<sup>th</sup> Cir. 1988).

7                 A Rule 12(b)(6) motion to dismiss is appropriate where the plaintiff has stated a claim  
 8     that omits one or more key elements of a cause of action. 9 *Schwarzer, et. al., California Practice*  
 9     *Guide, supra*, § 9:179. [“A motion to dismiss is often very effective where plaintiff has stated the  
 10   claim in vague, conclusory terms without setting forth one or more key elements.”] Such motion is  
 11   also proper where the plaintiff’s action is time-barred. See *Jablon v. Dean Witter & Co.*, 614 F.2d  
 12   677, 682 (9th Cir. 1980.)

13                 To avoid dismissal under Rule 12(b)(6), a complaint must include “enough facts to  
 14   state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly* 127 S.Ct. 1955,  
 15   1974 (2007). While a plaintiff is not required to plead “detailed factual allegations,” a plaintiff  
 16   nevertheless must plead sufficient facts “to provide the ‘grounds’ of his ‘entitle[ment] to relief,’  
 17   [which] requires more than labels and conclusions, and [for which] a formulaic recitation of the  
 18   elements of a cause of action will not do.” *Id.* at 1964-65. A complaint cannot simply “le[ave] open  
 19   the possibility that a plaintiff might later establish some ‘set of undisclosed facts’ to support  
 20   recovery.” *Id.* at 1968. Rather, the facts set forth in the complaint must be sufficient to “nudge []  
 21   the [] claims across the line from conceivable to plausible.” *Id.* at 1974. Because Plaintiff has failed  
 22   to allege sufficient facts that provide “the ‘grounds’ of his ‘entitle[ment] to relief’ his claims must be  
 23   dismissed.

1       **IV.    LEGAL ARGUMENT**

2       **A.    PLAINTIFF'S FIRST CAUSE OF ACTION FOR CONSPIRACY TO  
3           VIOLATE CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION  
4           17200, HIS THIRD CAUSE OF ACTION FOR CONSPIRACY TO VIOLATE  
5           THE FLSA AND HIS FIFTH CAUSE OF ACTION FOR CONSPIRACY TO  
6           VIOLATE CALIFORNIA LABOR CODE SECTION 558 FAIL TO STATE  
7           FACTS SHOWING A JUSTICIALE CONSPIRACY**

8           Conspiracy is not an independent cause of action “but a legal doctrine that imposes  
9           liability on persons who, although not actually committing a tort themselves, share with the  
10          immediate tortfeasor a common plan or design.” *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7  
11          Cal. 4<sup>th</sup> 503-511 (1994). To state a claim for conspiracy, “the complaint must allege (1) the  
12          formation and operation of a conspiracy; (2) the wrongful act or acts done pursuant thereto; and (3)  
13          the damage resulting from such act or acts.” *General American Life Ins. Co. v. Rana*, 769 F. Supp.  
14          1121, 1125 (N.D. Cal. 1991). “To establish the ‘wrongful act’ element of a civil conspiracy,  
15          defendant must satisfy all of the elements of a cause of action for some other tort or wrong.” *Id.*  
16           “[A] simple failure to comply with statutory overtime requirements...does not qualify” to support a  
17          claim for conspiracy. *Reynolds v. Bement*, 36 Cal. 4<sup>th</sup> 1075, 1090 (2005). Moreover, a conspiracy  
18          necessarily involves two or more people or entities. *Black v. Bank of America*, 30 Cal. App. 4<sup>th</sup> 1, 6  
19          (1995). “Agents and employees of a corporation cannot conspire with their corporate principal or  
20          employer where they act in their official capacities on behalf of the corporation and not as  
21          individuals for their individual advantage.” *Reynolds v. Bement*, 36 Cal. 4<sup>th</sup> 1075, 1090 (2005).

22           In this action, Plaintiff has failed to allege facts showing the formation and operation  
23          of a conspiracy. Moreover, Plaintiff’s allegations against AC Square, Inc., Comcast, Inc., Mr.  
24          Afshin Ghaneh and/or Mr. Andrew Bahmanyar are legally insufficient to show one or more people  
25          acted together to conspire against him.

26       **1.    PLAINTIFF HAS FAILED TO ALLEGE FACTS SHOWING THE  
27           FORMATION AND/OR OPERATION OF ANY ALLEGED  
28           CONSPIRACY**

29           Plaintiff’s Complaint is devoid of any allegations showing the formation and  
30          operation of a conspiracy, any wrongful act or acts done in accordance with an alleged conspiracy,  
31          and fails to allege any legally compensable damage from any alleged conspiracy. Plaintiff’s

1 allegations that AC Square, Inc. failed to “pay class members the wages due to them as alleged  
 2 herein which conduct was done in concert and pursuant to an agreement with Comcast, Afshin  
 3 Ghaneh and Andrew Bahmanyar” is insufficient to sustain this claim. (Request for Judicial Notice,  
 4 Exh. F, ¶ 13, p. 22-24; ¶ 21, p. 8-11). Plaintiff has not alleged any facts showing the formation and  
 5 operation of the alleged conspiracy, any improper act done pursuant to the conspiracy, and/or any  
 6 damage properly redressable through this cause of action. At most Plaintiff has alleged he and other  
 7 employees did not receive all compensation for all hours they worked. As stated above, an  
 8 unsupported conclusion that AC Square, Inc. did not pay its employees for all hours they claim to  
 9 have worked is not sufficient to support a conspiracy claim. *Reynolds v. Bement*, 36 Cal. 4<sup>th</sup> 1075,  
 10 1090 (2005). (stating, “[A] simple failure to comply with statutory overtime requirements...does not  
 11 qualify” to support a claim for conspiracy). Thus, Plaintiff has failed to allege sufficient facts to  
 12 sustain this claim.

13           **2. PLAINTIFF HAS FAILED TO ALLEGE FACTS SHOWING ANY  
 14           ALLEGED CONSPIRACY INVOLVED TWO OR MORE PEOPLE OR  
 15           ENTITIES**

16 Plaintiff has also failed to allege facts showing the predicate requirement that two or  
 17 more people agreed to carry out any alleged conspiracy. Plaintiff’s conspiracy allegations against  
 18 Afshin Ghaneh and Andrew Bahmanyar are not sufficient to sustain this claim because, even if  
 19 assumed true, Plaintiff’s admits they were acting within their capacity as agents of AC Square, Inc.  
 20 and therefore cannot constitute separate individuals for the purposes of a conspiracy cause of action  
 21 pursuant to the agent immunity rule. In addition, Plaintiff has failed to allege Comcast, Inc. owed  
 22 him, or any other class members, any obligation whatsoever and therefore cannot identify any duty  
 23 Comcast, Inc. would have violated necessary to sustain this claim.

24           **a. PLAINTIFF HAS FAILED TO ALLEGE FACTS SHOWING  
 25           MR. BAHMANYAR’S ALLEGED ACTS ARE NOT SUBJECT  
 26           TO THE AGENT IMMUNITY RULE**

27 Plaintiff claims that Mr. Bahmanyar’s involvement in the alleged conspiracy is based  
 28 on his alleged nonexclusive responsibility for AC Square, Inc.’s payroll and business practices.  
 (Request for Judicial Notice, Exh. F ¶ 5, p. 17-19; ¶ 13, p. 4:22-27; 5:1; ¶ 21, p. 6:8-11). The  
 Complaint does not contain any allegations that Mr. Bahmanyar acted outside his official capacity in  
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1 doing any alleged improper act. See *Black v. Bank of America*, 30 Cal. App. 4<sup>th</sup> 1, 4 (1994). At  
 2 most, Plaintiff claims that Mr. Bahmanyar failed to pay Plaintiff all wages due owing in his capacity  
 3 as AC Square, Inc.'s agent. (Request for Judicial Notice, Exh. F ¶ 5, p. 2:17-19; ¶ 13, p. 4:22-27;  
 4 5:1; ¶ 21, p. 6:8-11).

5 Specifically, Plaintiff claims Mr. Bahmanyar was partially responsible for AC  
 6 [Square, Inc.'s] payroll and business practices" and AC Square, Inc.'s "refusal to pay class members  
 7 the wages due to them ... was done in concert and pursuant to an agreement with" the other  
 8 defendants. (See Request for Judicial Notice, Exh. F, ¶ 5, p. 2:17-19; ¶ 13, p. 4:22-26, ¶ 21:8-11).  
 9 As Mr. Bahmanyar could not possibly fail to pay Plaintiff or the other class members any wages to  
 10 which they were entitled but for Mr. Bahmanyar's alleged non-exclusive responsibility for AC  
 11 Square, Inc.'s payroll and business practices, he necessarily must have been acting in his capacity as  
 12 AC Square, Inc.'s agent in doing the alleged improper acts. Because "directors and officers of a  
 13 corporation do not incur personal liability for torts of the corporation merely by reason of their  
 14 official position" and corporate agents, such as Mr. Bahmanyar, are "not personally liable for the  
 15 corporate employer's failure to pay its employee's wages", *Reynolds v. Bement*, 36 Cal. 4<sup>th</sup> 1075,  
 16 1087, Plaintiff's second cause of action cannot be sustained against Mr. Bahmanyar as a matter of  
 17 law.

18                   **b. PLAINTIFF HAS FAILED TO ALLEGE FACTS SHOWING  
 19 MR. GHANEH'S ALLEGED ACTS ARE NOT SUBJECT TO  
 THE AGENT IMMUNITY RULE**

20 As with Mr. Bahmanyar, Plaintiff claims Mr. Ghaneh is partially responsible for AC  
 21 Square, Inc.'s payroll and business practices (Request for Judicial Notice, Exh. F, ¶ 5, p. 2:16-17).  
 22 Plaintiff also alleges that Mr. Ghaneh owns one hundred percent of AC Square, Inc. and has final say  
 23 on any of its policies and practices. (Request for Judicial Notice, Exh. F, ¶ 5, p. 2:16-17). However,  
 24 these allegations are insufficient to show Mr. Ghaneh's alleged actions are not subject to the agent  
 25 immunity rule.

26 The Third Complaint fails to allege any facts showing that Mr. Ghaneh acted in any  
 27 fashion outside his role as a managerial employee, officer and/or director of AC Square, Inc.  
 28 Moreover, as the alleged conspiracy claims Mr. Ghaneh acted with the other Defendants to not pay  
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1 Plaintiff all wages owing, such acts could only be done by and through his agency with AC Square,  
 2 Inc. Plaintiff has not alleged Mr. Ghaneh did any act unrelated to his position with AC Square, Inc.  
 3 or violated any duty owed by Mr. Ghaneh to Plaintiff. Thus, even if Plaintiff is able to show Mr.  
 4 Ghaneh had some involvement with AC Square, Inc.'s alleged failure to pay its employees overtime,  
 5 Plaintiff cannot sustain his conspiracy causes of action against Mr. Ghaneh as a matter of law  
 6 pursuant to the agent immunity rule. *Reynolds v. Bement*, 36 Cal. 4<sup>th</sup> 1075, 1087.

7                   **c. PLAINTIFF HAS FAILED TO ALLEGE FACTS SUFFICIENT**  
 8                   **TO SHOW COMCAST, INC. DID ANY ACT SUFFICIENT TO**  
                     **SUSTAIN HIS CAUSE OF ACTION FOR CONSPIRACY**

9 Plaintiff has failed to allege any duty owed by Comcast, Inc. to Plaintiff which, if  
 10 breached, would support his conspiracy cause of action against Comcast, Inc. Absent such a duty,  
 11 no conspiracy claim can be made. See *Litton v. Saudi Arabia Ltd.*, 7 Cal. 4<sup>th</sup> 503, 520 (1994)  
 12 (stating, "the doctrine of conspiracy does not impose liability on persons who owe *no duty* to a  
 13 plaintiff or who are otherwise immune from liability."). A conspiracy claim cannot be based on a  
 14 contract cause of action. *Reynolds v. Bement*, 36 Cal. 4<sup>th</sup> 1075, 1090 (2005). Because a claim for  
 15 overtime wages is a contract cause of action, it cannot support a conspiracy claim. See *Hays v. Bank*  
 16 *of America*, 71 Cal. App. 2d 301, 305 (applying the FLSA and stating "federal cases have definitely  
 17 determined that claims for such overtime wages ... are not ex delicto or founded on tort, but on the  
 18 contrary that they sound in contract.").

19 The only causes of action in the Third Complaint are for an alleged failure to pay  
 20 overtime compensation. As such, the Third Complaint contains only contract causes of action  
 21 against the Defendants, including Comcast, Inc. and therefore cannot support a claim for conspiracy.  
 22 Moreover, as Plaintiff has failed to allege any facts showing Comcast, Inc. owed any duty to  
 23 Plaintiff whatsoever, Plaintiff cannot amend the Complaint to state any facts sufficient to sustain any  
 24 claim against Comcast, Inc.

25 Plaintiff's failure to allege facts showing the predicate requirement that two or more  
 26 persons conspired to violate any appropriate tort cause of action precludes him from maintaining his  
 27 first, third and fifth causes of action as a matter of law and they must be dismissed.

1           **B. PLAINTIFF'S COMPLAINT FAILS TO STATE FACTS SUFFICIENT TO**  
 2           **SUSTAIN HIS SECOND CAUSE OF ACTION FOR VIOLATION OF THE**  
 3           **FLSA**

4           **1. PLAINTIFF CAUSE OF ACTION FOR VIOLATION OF THE FLSA IS**  
 5           **BARRED BY THE STATUTE OF LIMITATIONS**

6           The statute of limitations for an alleged violation of the FLSA is two years. *See* 29  
 7 U.S.C. § 255(a). The FLSA's statute of limitations period is extended to three years only if the  
 8 employer's violation is willful. *Id.* "The limitations period for an action under the FLSA begins to  
 9 run at the time the employer breaches his duties under the Act..." *Huss v. City of Huntington Beach*,  
 10 317 F. Supp. 2d 1151, 1161 (C.D. Cal. 2000) (citing *Unexcelled Chem. Corp. v. United States*, 73  
 11 S.Ct. 580, 584 (1953)). "It is well settled that 'A separate cause of action for overtime compensation  
 12 accrues at each regular payday immediately following the work period during which the services  
 13 were rendered and for which overtime compensation is claimed.'" *Mitchell v. Lancaster Milk Co.*,  
 14 185 F. Supp. 66, 70 (D.C. PA 1960).

15           Based on the clear and unambiguous limitations period for a plaintiff to bring a FLSA  
 16 claim, Plaintiff cannot sustain his second cause of action against Defendants as any potential FLSA  
 17 claim is barred by the statute of limitations. Plaintiff admitted he worked for AC Square, Inc. from  
 18 "about January 30, 2005" to "about May 2, 2005." (Request for Judicial Notice, Exh. A, ¶ 5, p. 2:9; ¶  
 19 13, p. 3:11). This allegation in his Original Complaint constitutes a judicial admission of which this  
 20 Court may take judicial notice and which is binding on Plaintiff. *American Title Ins. Co. v. Lacelaw*  
 21 *Corp.*, 861 F.2d 224, 226 (9<sup>th</sup> Cir. 1988) (stating "under federal law, stipulations and admissions in  
 22 the pleadings are generally binding on the parties and the Court."). As pertinent to this motion, the  
 23 *American Title Ins. Co.* Court stated:

24           "[U]nder federal law, stipulations and admissions in the pleading are generally  
 25 binding on the parties and the Court. Not only are such admissions and  
 26 stipulations binding before the trial court, but they are binding on appeal as  
 27 well." (citations omitted). "Judicial admissions are formal admissions in the  
 28 pleadings which have the effect of withdrawing a fact from issue and  
 29 dispensing wholly with the need for proof of the fact." (citation omitted).  
 30 Factual assertions in the pleadings...,unless amended, are considered judicial  
 31 admissions conclusively binding on the party who made them....A statement  
 32 in a complaint, answer or pretrial order is a judicial admission, as is a failure  
 33 in an answer to deny an allegation. *Id.*

34           Plaintiff's admission in his Original Complaint that he last worked for AC Square,

1 Inc. on May 2, 2005 is an unequivocal statement of fact that has never been amended, withdrawn or  
 2 otherwise modified. As this admission was made by Plaintiff, it establishes the last date Plaintiff  
 3 worked for AC Square, Inc. for the purposes of this motion and the date Plaintiff's causes of action,  
 4 including his cause of action for the alleged violation of the FLSA, began to run.

5 Plaintiff's FLSA claims began to run when AC Square, Inc. allegedly breached its  
 6 "duties under the [FLSA]..." *Huss v. City of Huntington Beach*, 317 F. Supp. 2d 1151, 1161 (C.D.  
 7 Cal. 2000). Thus, it does not matter whether Plaintiff claims AC Square, Inc. negligently or  
 8 intentionally violated the Act because Plaintiff did not file his Third Complaint, until June 10, 2008,  
 9 more than thirteen months after the statute of limitations ran on a non-willful violation and more  
 10 than a month after the statute ran on an alleged willful violation. Thus, Plaintiff's second cause of  
 11 action for violation of the FLSA must be dismissed.

12 **2. PLAINTIFF HAS FAILED TO ALLEGE FACTS SHOWING AC  
 13 SQUARE, INC. VIOLATED THE FLSA**

14 Even if Plaintiff's FLSA cause of action is not barred by the statute of limitations,  
 15 Plaintiff has failed to allege sufficient facts to sustain this claim. At most, Plaintiff has alleged AC  
 16 Square, Inc. "failed to pay each class member wages during all hours that they worked" and he  
 17 and/or other employees were "not paid for overtime when he worked more than an 8 hour day...more  
 18 than a forty hour week...the seventh day in a row...[or] over eight hours on the seventh day."  
 19 (Request for Judicial Notice, Exh. F ¶ 9, p. 3:17-19).

20 Assuming Plaintiff's allegations refer to 29 U.S.C. sections 206 and/or 207, these  
 21 conclusory allegations are insufficient to state a cause of action for a violation of the FLSA. .

22 **a. PLAINTIFF HAS FAILED TO ALLEGE FACTS SHOWING  
 23 DEFENDANTS VIOLATED 29 U.S.C. SECTION 206**

24 29 U.S.C. Section 206 states, in pertinent part, "Every employer shall pay to each of  
 25 his employees who in any workweek is engaged in commerce or in the production of good for  
 26 commerce, or is employed in an enterprise engaged in commerce or in the production of goods for  
 27 commerce, wages at the following rates...". 29 U.S.C. § 206(a). "[T]o establish a violation of the  
 28 minimum wage requirements of the FLSA, a plaintiff... must demonstrate that he[/she] was engaged  
 in compensable activity within the meaning of the statute and that the wages received for that  
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activity, if any, were below the statutory minimum wage.” *Hensley v. MacMillan Bloedel Containers, Inc.*, 786 F.2d 353, 355 (8<sup>th</sup> Cir. 1986). There is no violation of the FLSA’s minimum-wage provisions “so long as the total weekly wage paid by an employer meets the minimum weekly requirements of the statute, such minimum weekly requirement being equal to the number of hours actually worked that week multiplied by the minimum hourly statutory requirement.” *Id.* at 357.

Plaintiff’s conclusion that AC Square, Inc. “fail[ed] to pay overtime to class members even though it is clear that class members are entitled to overtime for each workweek that they work over 40 hours in a week.” is insufficient to sustain this claim. (Request for Judicial Notice, Exh. F ¶ 17, p. 5:18-20). Plaintiff has failed to allege any activity that he or the putative class members were engaged in that would be compensable for the purposes of the FLSA, what hours he or the putative class members allegedly worked, the amount of compensation they actually received, or any other facts that would permit an inference that he or the putative class members were actually paid less than the minimum wage as required by the FLSA. Plaintiff’s conclusion that he and the other putative class members were not paid for all hours worked without pleading any factual support is not sufficient to support a cause of action for violation of 29 U.S.C Section 206. Thus, Plaintiff’s second cause of action for violation of the FLSA must be dismissed.

### **3. PLAINTIFF HAS NOT ALLEGED FACTS SHOWING DEFENDANTS VIOLATED 29 U.S.C. SECTION 207**

29 U.S.C. section 207 states, in pertinent part, that “no employer shall employ any of his employees ... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half the regular rate at which he is employed.” 29 U.S.C. § 207(a)(1). As stated above, Plaintiff fails to allege that he or any other putative class member worked forty or more hours at any given time. At most, Plaintiff alleges he and the putative class members “were not paid overtime” without alleging any entitlement to overtime compensation. (Request for Judicial Notice, Exh. F, ¶ 5, p. 2:20). This conclusory pleading is insufficient according to *Bell Atlantic Corp. v. Twombly* 127 S.Ct. 1955 (2007) as it is nothing more than “labels and conclusions” rather than allegations of fact providing “the ‘grounds’ of his ‘entitle[ment] to relief.’” *Id.* at 1964-65, 1974. Thus, Plaintiff cannot

1 sustain his second cause of action for an alleged violation of the FLSA against AC Square, Inc. as a  
 2 matter of law.

3           **C. PLAINTIFF'S COMPLAINT FAILS TO STATE FACTS SUFFICIENT TO  
 4 SUSTAIN HIS THIRD CAUSE OF ACTION FOR CONSPIRACY TO  
 5 VIOLATE THE FLSA**

6 Plaintiff's third cause of action for "Conspiracy to Violate the Fair Labor Standards  
 7 Act" is also time barred because the statute of limitations is either two or three years. *Maheu v. CBS,*  
 8 *Inc.*, 201 Cal. App. 3<sup>rd</sup> 662, 673 (1988) (stating, "In an action based on civil conspiracy, the  
 9 applicable statute of limitations is determined by the nature of the action in which the conspiracy is  
 10 alleged."). Thus, Plaintiff's third cause of action is barred by the statute of limitations prescribed by  
 the FLSA for the same reasons Plaintiff's FLSA cause of action is barred. *See supra* Part IV.B.1.

11           **D. PLAINTIFF'S COMPLAINT FAILS TO STATE FACTS SUFFICIENT TO  
 12 SUSTAIN HIS FOURTH CAUSE OF ACTION FOR VIOLATION OF  
 13 CALIFORNIA LABOR CODE 203**

14 While not specifically alleged in the Third Complaint, Plaintiff's fourth cause of  
 15 action for failure to pay wages at termination of employment appears to be based on California  
 Labor Code section 203. This statute states, in pertinent part:

16           If an employer willfully fails to pay, without abatement or reduction, in  
 17 accordance with Sections 201, 201.5, 202, and 205.5, any wages of an  
 18 employee who is discharged or who quits, the wages of the employee shall  
 19 continue as a penalty from the due date thereof at the same rate until paid or  
 until an action therefor is commenced; but the wages shall not continue for  
 more than 30 days....

20           Suit may be filed for these penalties at any time before the expiration of the  
 21 statute of limitations on an action for the wages from which the penalties  
 22 arise.

23           Cal. Lab. Code § 203 (West 2008).

24           **1. Plaintiff's Fourth Cause of Action for Violation of California Labor Code  
 25 section 203 is Barred by the Statute of Limitations**

26 Any claim Plaintiff may have had for penalties under California Labor Code section  
 27 203 is also barred by the statute of limitations. Plaintiff admitted he last worked for AC Square, Inc.  
 28 on "about May 2, 2005." (Request for Judicial Notice, Exh. A, ¶ 13, p. 3:11). Thus, any claim for  
 penalties under section 203 must have been filed by no later than May 2, 2008. As Plaintiff did not  
 file his complaint until June 10, 2008, he cannot sustain his cause of action for penalties under  
 15.

1 section 203 as a matter of law.

2 Plaintiff may argue that he is entitled to apply the four year statute of limitations from  
 3 his cause of action for conspiracy to violate California Business and Professions Code section 17200  
 4 to his claim for penalties under California Labor Code section 203. *See Cal. Bus. Prof. Code § 17208*  
 5 (West 2008). However, such an argument is without merit. First, as shown above, Plaintiff cannot  
 6 sustain his first cause of action against AC Square, Inc. as a matter of law. Second, Remedies for  
 7 alleged violations of California Business and Professions Code section 17200 et seq. are specifically  
 8 limited to restitutionary and injunctive relief. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.  
 9 4<sup>th</sup> 1134, 1144 (2003). Plaintiff cannot recover damages, such as penalties provided by California  
 10 Labor Code section 203 under a cause of action for violation of California Business and Professions  
 11 Code section 17200 et seq. *Cortez v. Purolator Air Filtration Products*, 23 Cal. 4<sup>th</sup> 163, 173 (2000).

12 The remedy provided by California Labor Code section 203 expressly states that it is  
 13 a penalty and not restitutionary in nature or effect. This plain meaning has been confirmed by courts  
 14 that have considered the issue. *Murphy v. Kenneth Cole Production, Inc.*, 40 Cal. 4<sup>th</sup> 1094, 1108  
 15 (2007) (stating the remedy provided by California Labor Code section 203 is a penalty); *Caliber*  
 16 *Bodyworks, Inc. v. Superior Court*, 134 Cal. App. 4<sup>th</sup> 365, 380 (2005) (referring to the “statutory  
 17 penalty provided by [California Labor Code] section 203.”); *Mamika v. Barca*, 68 Cal. App. 4<sup>th</sup> 487,  
 18 491 (1988) (stating “[California Labor Code] Section 203 mandates an additional penalty if an  
 19 employer willfully fails to comply with section 202. In such a case, “... the wages of the employee  
 20 shall continue as a penalty from the due date thereof at the same rate until paid or until an action  
 21 therefor is commenced; but the wages shall not continue for more than 30 days.”).

22 Applying the above, the Federal Courts consistently hold a plaintiff is not permitted  
 23 to seek penalties under California Labor Code section 203 through a cause of action for an alleged  
 24 violation of California Business and Professions Code section 17200 et seq. *Montecino v. Spherion*  
 25 *Corp.*, 427 F. Supp 2d 965, 967 (C.D. Cal. 2006) (holding a claim for penalties under California  
 26 Labor Code section 203 is not recoverable in a cause of action for a violation of California Business  
 27 and Professions Code section 17200 and stating “The Court finds that § 203 payments are clearly a  
 28 penalty, and thus cannot be claimed pursuant to the UCL”); *Tomlinson v. Indymac Bank, F.S.B.* 359  
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1 F. Supp. 2d 891, 895 (C.D. Cal. 2005) (stating “The Court agrees with [defendant] that the remedy  
 2 contained in Section 203 is a penalty.... This type of payment clearly is not restitutionary, and thus  
 3 cannot be recovered under the UCL.”). Because the remedy under California Labor Code section  
 4 203 is a penalty and not restitutionary, it is governed by the three year statute of limitations in  
 5 California Code of Civil Procedure section 338(a) and not the four year statute of limitations in  
 6 California Business and Professions Code section 17208.

7 Therefore, Plaintiff cannot sustain his fourth cause of action for violation of  
 8 California Labor Code section 203 as his Complaint was filed more than three years after the AC  
 9 Square, Inc.’s alleged improper acts and is time barred.

10       **E. PLAINTIFF’S COMPLAINT FAILS TO STATE FACTS SUFFICIENT TO  
 11 SUSTAIN HIS FIFTH CAUSE OF ACTION FOR CONSPIRACY TO  
 12 VIOLATE CALIFORNIA LABOR CODE 558**

13       California Labor Code section 558 states, in pertinent part:

14       (a) Any employer or other person acting on behalf of an employer who  
 15 violates, or causes to be violated, a section of this chapter or any provision  
 16 regulating hours and days of work in any order of the Industrial Welfare  
 17 Commission shall be subject to a civil penalty as follows....

18       Cal. Labor Code § 558 (West 2008).

19       **1. Plaintiff’s Fifth Cause of Action for Conspiracy to Violate California  
 20 Labor Code section 558 is Barred by the Statute of Limitations**

21       California Code of Civil Procedure section 340(a) prescribes a one-year statute of  
 22 limitations on actions by an individual to recover a statutory penalty, such as that provided for by  
 23 California Labor Code section 558. *See* Cal. Code Civ. Proc. § 340(a) (West 2008) (stating, “Within  
 24 one year: (a) An action upon a statute for a penalty or forfeiture, if the action is given to an  
 25 individual, or to an individual and the state, except if the statute imposing it prescribes a different  
 26 limitation.”).

27       Because California Labor Code section 558 provides for a civil penalty in the event  
 28 an employer or other person acting on behalf of an employer violates a section of the chapter, any  
 claim for penalties must be brought within one year of the alleged violation. As Plaintiff last worked  
 for AC Square, Inc. more than one year prior to the filing of the Third Complaint, his fifth cause of  
 action cannot be sustained as a matter of law.

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1       **V. CONCLUSION**

2                  For the above stated reasons, Defendants respectfully request this Court grant the this  
 3 Motion and enter an order as follows:

- 4                  1. Plaintiff's first cause of action for "Conspiracy to Violate Business and  
 5 Professions Code § 17200" is dismissed as it fails to state facts sufficient to constitute  
 6 a cause of action against Defendants;
- 7                  2. Plaintiff's second cause of action for "Violation of Fair Labor Standard Act"  
 8 is dismissed as it fails to state facts sufficient to constitute a cause of action against  
 9 Defendants.
- 10                 3. Plaintiff's third cause of action for "Conspiracy to Violate the Fair Labor  
 11 Standard Act" is dismissed as it fails to state facts sufficient to constitute a cause of  
 12 action against Defendants;
- 13                 4. Plaintiff's fourth cause of action for "Failure to Pay Monies Due at  
 14 Termination of Employment" is dismissed as it fails to state facts sufficient to  
 15 constitute a cause of action against Defendants;
- 16                 5. Plaintiff's fifth cause of action for "Conspiracy to Violate [California] Labor  
 17 Code Section 558" is dismissed as it fails to state facts sufficient to constitute a cause  
 18 of action against Defendants.

19                 Dated: July 25, 2008



21                 RONALD A. PETERS  
 22 BENJAMIN EMMERT  
 23 LITTLER MENDELSON  
 24 A Professional Corporation  
 25 Attorneys for Defendants  
 AC SQUARE INC., AFSHIN GHANEH,  
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